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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-787

LEWIE FRANK TIDWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Lewie Frank Tidwell, prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 14, 1977, petition for rehearing denied on November 1, 1977.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It affirmed a judgment of conviction of petitioner for: 1. willfully and knowingly issuing Letters of Credit, drawn against the credit of Eglin National Bank, without authority of the bank's Board of Directors in violation of Title 18 U.S.C. §1005; and 2. willfully and knowingly misapplying bank funds with the intent to injure or defraud the bank in violation of Title 18 U.S.C. §656. Petitioner was tried in the District Court by a jury and the Order of the Trial Court denying defendant's motion for new trial is attached as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 14, 1977, petition for rehearing denied on November 1, 1977. Jurisdiction of this court is invoked under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

FIRST: Did the Court below abuse its judicial discretion by refusing to consider the petitioner's conviction on the first five counts of the seven counts upon which he was convicted?

SECOND: Did the lower court err in holding that the trial court's "natural and probable consequence" charge did not shift the burden of proof to the defendant?

THIRD: Did the Court below err by failing to address a major portion of petitioner's appeal?

STATUTES INVOLVED

The statutes involved are United States Revised Statutes §5209, 12 U.S.C. 592 (1913), and 18 U.S.C. §§334, 656 and 1005. Because these provisions are lengthy, their pertinent text is set forth as Appendix D, p. 1d.

STATEMENT OF THE CASE

A ten count indictment was filed on August 18, 1976, in the United States District Court for the Northern District of Florida against the petitioner, Lewie Frank Tidwell. Two counts were withdrawn from the jury's consideration and the petitioner was acquitted on a third count by the jury.

The remaining 7 counts fall into two categories: 1. Counts One, Three, Five, Six and Seven alleged that Tidwell willfully and knowingly issued various letters of credit, drawn against the credit of Eglin National Bank, without authority of the Bank's board of directors, in violation of Title 18 U.S.C. §1005; and 2. Counts Nine and Ten alleged that Tidwell willfully and knowingly misapplied bank funds with the intent to injure or defraud the bank in violation of Title 18 U.S.C. §656.

Tidwell was sentenced to three years on each count, all sentences to run concurrently. On appeal Tidwell argued three points relative to the trial court

proceedings and one point regarding proceedings on the appellate level. Tidwell argued that a violation of 18 U.S.C. §1005 required an "intent to injure or defraud the bank." The trial court refused to give a requested jury instruction to that effect. Tidwell's second argument on appeal was that the trial court's refusal to allow into evidence a certified copy of the foreclosure proceedings pertinent to Counts Nine and Ten crippled his defense, and that the trial court's "natural and probable consequence" instruction shifted to the Defendant the burden of proving a lack of the required intent. In addition, Tidwell's third argument was that when convictions on a bulk of the counts in a multi-count indictment are erroneous, the cause should be remanded for a new trial on the remaining counts, or, at the very least, for a determination from the trial court that the unsound convictions did not influence the trial court in his sentence. This last contention was not addressed by the appellate court and the convictions as to Counts Nine and Ten were affirmed. The Court declined to address the attacks on the remaining five counts as a matter of "judicial discretion." The order denying a petition for re-hearing was entered November 1, 1977.

REASONS FOR GRANTING THE WRIT

This petition raises three substantial questions concerning the administration of criminal justice in the federal courts. The first two questions involve serious conflicts in opinions among the district courts and the third question involves the continued abuse of discretion practiced by the district courts in the

application of the "concurrent sentence doctrine." This court has not passed on the question of what elements the Government must prove to establish a violation of Title 18 U.S.C. §1005 although at least two circuit courts have addressed the issue, each reaching a different conclusion. Nor has this Court clearly resolved the continuing conflict among circuit courts regarding the "natural and probable consequence" charge used in District Courts throughout the jurisdiction of this court. In addition, although this Court has established general guidelines for the application of the "concurrent sentence doctrine" regarding the direct effect on the defendant, it has not established such guidelines regarding the collateral effects.

FIRST

Throughout the trial proceedings and on appeal, the petitioner maintained that an intent "to injure or defraud the bank" was an essential element of a violation of Title 18 U.S.C. §1005. This contention was derived from an exhaustive review of the legislative history of the statutes involved and the decision from the Ninth Circuit Court of Appeals in *United States v. Pollock*, 503 F.2d 91 (9th Cir. 1974). The lower court (see Appendix A) as well as the trial court (see Appendix C) acknowledged the opinion of the 9th Circuit but refused to apply that rationale in the instant case. The trial court, relying on the precedent established by the Fifth Circuit in *United States v. Harrison*, 279 F.2d 19 (5th Cir. 1960), held that:

"It may well be that the Fifth Circuit, inasmuch as it has adopted the petition of these other courts reading this language into 18 U.S.C. §656, may also recede from its prior decision and hold such intent also to be an essential element of 18 U.S.C. §1005. As it has not yet done so, however, this Court concluded at trial, and now concludes, it should adhere to the rule of *Harrison* to the effect that such intent to injure or defraud is not an essential element. The rule in *Harrison*, if changed, should be changed by the Fifth Circuit and not this Court."

The Fifth Circuit also acknowledging the possibility of irreconcilable opinions declines to address those points of the appeal as a matter of judicial discretion.

Title 18 U.S.C. §1005 presently consists of three separate paragraphs, only one of which includes the words "with intent to injure or defraud." (See Appendix D, 18 U.S.C. §1005). The petitioner was charged under paragraph 2 of this section, said paragraph not including the words in question. The omission of the intent from the other two paragraphs was a oversight on the revisor's part, as becomes evident from an examination of the statute's legislative history.

Title 18 U.S.C. §1005, as it presently exists, had its origins with Revised Statutes, Section 5209 which, in a single paragraph, set out the violation charged in the instant case, and included the words "with intent, in either case, to injure or defraud." (See Appendix D, Rev. Stat. Section 5209). In 1913, Revised Statutes, Section 5209 was recodified as 12 U.S.C. §592, which again included all parts of the sections in a single paragraph and did require "intent, in any case, to injure or defraud." (See Appendix D, 12 U.S.C. §592).

The most recent revision of those sections occurred in 1948 when the statute was revised and its contents separated into three separate statutes, those being 18 U.S.C. §§334, 656 and 1005. The revisor's notes state that the revisions were intended to clarify and condense, without changing in any way the meaning or substance of the existing law.[1]

The Ninth Circuit Court of Appeal in considering the revisor's notes as well as the legislative history of the statute required that an intent to injure or defraud the bank was an essential element of a violation of Section 1005.

The Fifth Circuit in 1960, however, in *Harrison v. United States*, supra, concluded that since the language of the statute was clear and unambiguous, no intent to injure or defraud was a required element of a violation of 18 U.S.C. Section 1005.

As previously noted three separate statutes have the same origin in 12 U.S.C. Section 592. At least 4 circuit

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[1] "Revision note – Former Section 592 of Title 12 was separated into three sections the first of which, embracing provisions relating to embezzlement, abstracting, purloining, or willfully misapplying moneys, funds, or credits, constitutes part of the basis for this section (Section 656). Of the other two sections, one §334 of this title, relates only to the issuance and circulation of federal reserve notes and other, *§1005 of this title, to false entries or the wrongful issue of bank obligations. The original section, containing more than 500 words, was verbose, diffuse, redundant and complicated. The enumeration of banks affected is repeated eight times. The revised section without changing in any way the meaning or substance of existing law, clarifies, condenses, and combines related provisions largely rewritten in matters of style.*" (Emphasis added) 18 USC §656, revisor's note.

courts have reviewed the legislative history as it relates to Section 656, which incidentally, does not include the language "with intent to injure or defraud" and have reached a common result that such an intent was left out as an oversight on the revisor's part. *United States v. Docherty*, 468 F.2d 989 (2nd Cir. 1972); *United States v. Schmidt*, 471 F.2d 385 (3rd Cir. 1972); *United States v. Mann*, 517 F.2d 259 (5th Cir. 1975); and *United States v. Seals*, 221 F.2d 243 (8th Cir. 1955). This rationale was supplied by the Ninth Circuit in *United States v. Pollock*, supra, and did hold that such an intent is an essential element of Section 1005 as well. Thus, a clear and unresolved conflict exists among the circuit courts relative to whether or not an intent to injure or defraud should be an essential element under Title 18 U.S.C. Section 1005.

The lower court admitted that the question was squarely before it, and admitted that there were problems in reconciling the Fifth Circuit decisions in *United States v. Harrison*, supra, and *United States v. Mann*, supra, but declined to do so. Such an action constitutes an abuse of discretion on the part of the Fifth Circuit, and this Court should resolve the conflict now existing among the circuit courts under the jurisdiction of this Court.

SECOND

Unlike the convictions in Counts 1, 3, 5, 6 and 7, the petitioner was convicted on Counts 9 and 10 after the trial court instructed the jury that a violation of 18 U.S.C. §656 required that the government prove

beyond and to the exclusion of every reasonable doubt that the defendant intended to injure or defraud the bank. Thereafter, the trial court instructed the jury on several occasions as to what tests the government must meet regarding the burden of proof of intent. (See Appendix E).

While it is generally impossible to prove by direct evidence the intent of the defendant in a criminal case where intent is an essential element, the instruction on the "natural and probable consequences" tends, in many cases, to shift the burden of proof from the government to the defendant. This court, in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), held that due process "requires the prosecution to bear the burden of proof beyond the reasonable doubt on every element that constitutes the crime charged against the defendant." Thus, the error inherent in the "natural and probable consequences" charge takes on a constitutional dimension, and must be judged accordingly.

While such an instruction may technically be required, its application has created confusion and disparity among the circuit courts. The Second Circuit, for example, in *United States v. Bertolotti*, 529 F.2d 149 (2nd Cir. 1975), stated:

> "We have for many years warned against the use of this type of charge, *United States v. Barash*, 365 F.2d 395, 402-03 (2nd Cir. 1966), and are somewhat surprised as its continued appearance. Given our disposition of this case, there is no need to determine whether the "district courts" erroneous charge constitutes reversible error. We wish, however, to take this opportunity to again stress our disapproval of the "natural and probable consequences" charge and to remind trial judges

that its continued use may jeopardize otherwise sound convictions."

Similar problems on the wording of such instruction have arisen in other circuits. See *United States v. Wilkinson*, 460 F.2d 725 (5th Cir. 1972); *United States v. Releford*, 352 F.2d 36 (6th Cir. 1965); and *Cohen v. United States*, 378 F.2d 751 (9th Cir. 1967) cert. denied, 389 U.S. 897 (1967).

The apparent difficulty in determining the exact wording for such an instruction is the probability that the jury may infer that the mere doing of an act creates the intent required by the statute, thus enabling the government to secure a conviction without proving beyond a reasonable doubt that the necessary intent existed. This position was argued strenuously before the trial judge. (See Appendix E), but with no avail.

The circuit court in comparing its previous decisions relative to the natural and probable charge, determined that error existed in the instruction. This holding, however, would probably not have been the same had the issue been questioned before the Second Circuit. See *United States v. Bertolotti*, supra.

Because of its universal application, the "natural and probable consequences" charge should be reviewed by this court so that its application would gain some uniformity within the courts under the jurisdiction of this court.

THIRD

Although the application of the "concurrent sentence doctrine" was discussed by this court in *Benton v. Maryland*, 395 U.S. 784 (1969), this court did not

discuss the possible collateral effects which would make it necessary or proper for the circuit courts to elect not to apply the doctrine and address the issues raised by an appellant in a criminal case. In *Benton*, this Court did establish that there is "no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed." The apparent rationale behind that decision was that in any criminal case there are certain direct consequences to the defendant. More over, this Court, in *Benton* concluded that the mere possibility of collateral consequences is enough to give a criminal case the "impact of actuality" which make it necessary to review multiple convictions.

In the present case, although the defendant argued on appeal, that his case should be remanded to the trial court for a new trial because of the "spill-over" effect of the erroneous convictions on the convictions that were sound, the Fifth Circuit did not address those contentions.

In *United States v. Barash*, 365 F.2d 395 (2nd Cir. 1966) the Court held that there is a distinct possibility in multi-count indictments in which many of the counts are erroneous that there is a "spill-over" effect, and that "the jury might not have exercised its perogative of leniency if these charges alone had been before it."

Also applying the rationale of *Barash*, supra, and the rationale adopted by the Fifth Circuit in *United States v. Jerkins*, 530 F.2d 1203 (5th Cir. 1976) that the convictions on the unsound counts may have in some way affected the trial court in its determination of the sentence to be imposed under the remaining counts which may be sound.

The net result of the appellate court's failure to address the argument of the petitioner relative to Counts 1, 3, 5, 6, and 7 of this multi-count indictment is that the relief prayed for by the petitioner was denied. That relief being that the court did not determine whether the defendant was entitled to a new trial, nor whether the defendant was entitled to have his cause remanded for review of sentence, nor did the appellate court address the defendant's plea for petition for re-hearing relative to the disastrous collateral effect of the court's failure to so decide.

As pointed out in the petitioner's petition for re-hearing before the Fifth Circuit, he stood to have the entry of a substantial money judgment against him simply because of the failure of the appellate court to address his contentions. (See Appendix E)

The "concurrent sentence" doctrine as applied in the instant case results in a serious abuse of discretion and allows disastrous collateral effects, and this court should establish definitive guidelines as to the application of the judicial discretion available to the district courts in applying the concurrent sentence doctrine.

CONCLUSION

For the reasons stated, it is respectfully stated that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES G. ETHEREDGE
221 North Eglin Parkway
Fort Walton Beach, Fla. 32548
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has on this 1st day of December, 1977, been delivered by U.S. Mail to the Honorable Emory O. Williams, Assistant United States Attorney, P.O. Box 12313, Pensacola, Florida 32581, attorney for Respondent herein and to the Solicitor General, Department of Justice, Washington, D.C. 20530.

JAMES G. ETHEREDGE

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Lewie Frank TIDWELL,
Defendant-Appellant.

No. 76–4205.

United States Court of Appeals,
Fifth Circuit.

Sept. 14, 1977.

Appeal from the United States District Court for the Northern District of Florida.

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

SIMPSON, Circuit Judge:

Appellant, Lewie Frank Tidwell, was convicted upon trial by jury under seven counts of an original ten-count indictment.[1] These counts fell into two groups: Counts One, Three, Five, Six

1. Count Two was dismissed for failure to state an offense and judgment of acquittal was entered as to Count Four when the government failed to introduce evidence to support it. The jury found Tidwell not guilty of Count Eight.

and Seven alleged that Tidwell wilfully and knowingly issued various letters of credit, drawn against the credit of the Eglin National Bank, without authority of the Bank's board of directors, in violation of Title 18, U.S.C. § 1005. Counts Nine and Ten alleged that Tidwell wilfully and knowingly misapplied bank funds with the intent to injure and defraud the bank in violation of Title 18, U.S.C. § 656. Tidwell was sentenced to three years on each count, all sentences to run concurrently. In this appeal, he raises three points, one relating to the unauthorized issuance charges, the others to the misapplication of funds charges. We affirm his conviction as to Counts Nine and Ten and do not reach the other counts under the concurrent sentence doctrine.

I. THE FACTS

Tidwell was hired in September 1972 to serve as president of the Eglin National Bank. While in that position, he drew and issued several letters of credit for the benefit of different persons. At no time did he notify or seek approval from the board of directors with regard to these potential obligations. The unauthorized issuance of these letters of credit, including one in the amount of $43,500 to Marvin Chapman, formed the basis for Counts One through Seven.

Counts Nine and Ten involved a complex transaction in which several banks, principally Eglin and Merchants National of Mobile, loaned $600,000 to Marvin Chapman who offered as security two parcels of undeveloped land. In June 1974 Chapman approached Tidwell and offered 37 condominium units valued at $700,000 as additional collateral for his indebtedness if Eglin would do two things: (1) cover a check for $43,000 written by Chapman without sufficient funds, and (2) pay approximately $40,000 for the mortgage on the condominiums held by the Great American Mortgage Company. Tidwell contacted Merchants Bank and on July 17, 1974, Merchants credited Eglin's account in the amount of $85,000 to pay off the first mortgage on the condominiums. Tidwell applied $43,000 of these funds to cover Chapman's bad check, and attempted to pay off the mortgage with $38,000 of the remaining funds. Great American, however, refused Eglin's offer. In early August 1974, a $43,500 letter of credit issued to Chapman by Tidwell against Eglin's credit was called and required immediate payment. Tidwell used the remaining funds credited to Eglin's account by Merchants to pay this obligation. The payments on Chapman's bad check and his letter of credit formed the basis for Count Nine. Finally, after another intervening unsuccessful attempt,

Tidwell was able to secure the first mortgage for $41,562.61 which he paid out of Eglin's funds without approval or knowledge of the board of directors. This use of the bank's money formed the basis for Count Ten.

Tidwell urges two grounds for reversal of his conviction on Counts Nine and Ten: (1) that the trial judge's instruction concerning the "natural and probable consequences" of one's acts shifted the burden of proof to the defendant on the issue of intent, and (2) that the exclusion of evidence showing that the bank later foreclosed on the mortgage obtained by Tidwell seriously impaired his defense by not letting the jury know the actual consequences of Tidwell's acts. We find no merit to either of these arguments.

II. THE "NATURAL AND PROBABLE CONSEQUENCES" INSTRUCTION

[1] Tidwell claims that error occurred as a result of the following portion of the trial judge's instructions to the jury:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may but is not required to draw the inference and find that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the Government has proved beyond a reasonable doubt that the defendant possessed the requisite criminal intent. (T. 542)

This charge was duly objected to at the trial, preserving the point for appellate review.

This instruction bears little resemblance to that which was first condemned in *Mann v. United States*, 319 F.2d 404 (5th Cir. 1963), cert. denied, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964), as impermissibly shifting the burden of proof to the defendant. In *Mann*, the trial judge had given the following charge:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

Id. at 407. We held that the words "So unless the contrary appears from the evidence" shifted the burden of proof from the prosecution to the defendant to prove lack of intent. *Id.* at 409. No comparable language was included in the instant charge.

In addition to the lack of any burden shifting language, the instruction given falls within exceptions to the *Mann* rule developed by post-*Mann* cases in this Circuit. By repeatedly reminding the jury that the government bears the burden of proving beyond a reasonable doubt every element of the crime, the trial judge included adequate "curative provisions", in compliance with *United States v. Jenkins,* 442 F.2d 429, 438 (5th Cir. 1971). Also, testing the charge "as a whole and not by a single isolated sentence", we find no reversible error. *United States v. Duke,* 527 F.2d 386, 392–93 (5th Cir. 1976), cert. denied, 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1190. Finally, the instant charge follows almost *verbatim* the charge which we approved in *United States v. Wilkinson,* 460 F.2d 725, 733 (5th Cir. 1972). Instead of using only the language approved in *Wilkinson,* "[t]he jury may draw the inference that the accused intended all of the consequences . . . . ", the trial judge here added that the jury "may *but it is not required to* draw the inference . . ." These additional words gave further assurance that the jury would understand

the burden of proof to which the prosecution is held. Although we do not now require an instruction more carefully worded than that set forth in *Wilkinson,* we favor the instant charge as a more effective way of avoiding the abuse condemned in *Mann.*

We hold that the instant charge did not shift the burden of proof on the issue of intent. The trial judge was careful to avoid such a result.

III. EXCLUSION OF THE FORECLOSURE PROCEEDINGS

During the trial, Tidwell's counsel offered as evidence certified copies of the complaint and final judgment in a mortgage foreclosure action by the Eglin National Bank against Marvin Chapman. The trial judge, conceding relevance, sustained an objection to the introduction of this evidence on the ground that it was repetitious. T. 420–21. On appeal, Tidwell argues that exclusion of the evidence as to the mortgage foreclosure action was reversible error because it crippled his defense on the only issue in dispute with regard to the misapplication counts, namely, whether he misapplied the funds with an intent to injure and defraud the bank.

[2, 3] In *United States v. Mann,* 517 F.2d 259 (5th Cir. 1975), cert. denied, 423 U.S. 1087, 96 S.Ct. 878, 47 L.Ed.2d 97 (1976), we identified the four essential

elements of a violation of 18 U.S.C. § 656:

(1) that the accused was an officer, director, etc. of a bank,

(2) that the bank was connected in some way with a national or federally insured bank,

(3) that the accused wilfully misapplied the money, funds, etc. of said bank, and

(4) that the accused acted with intent to injure and defraud said bank.[2]

2. The statute, which reads as follows, does not mention specific intent:

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Rather, the intent requirement has been judicially read into the statute on the basis of its legislative history. *See, e. g., United States v. Docherty,* 468 F.2d 989 (2d Cir. 1972).

It is well established that "the requisite intent can be inferred from the facts and circumstances shown at trial". *United States v. Tokoph,* 514 F.2d 597, 603 (10th Cir. 1975). This intent exists "if a person acts knowingly and if the natural result of his conduct would be to injure or defraud the bank even though this may not have been his motive". *United States v. Schmidt,* 471 F.2d 385, 386 (3d Cir. 1972). Furthermore, and as the trial judge properly instructed the jury,

> An intent to injure or defraud . . . is not inconsistent with a desire for the ultimate success and welfare of the bank . . . A wrongful misapplication of funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted is none the less a violation of the statute, if the necessary effect is or may be to injure or defraud the bank.

Golden v. United States, 318 F.2d 357, 361–62 (1st Cir. 1963), citing *Galbreath v. United States,* 257 F. 648, 656 (6th Cir. 1918).[3] In accord with these principles,

3. In instructing the jury, the trial judge quoted verbatim from *Golden.* T. 541–42.

evidence that a Section 656 violation eventually worked to the bank's advantage does not negate the requisite intent:

> The ultimate or future possibility or probability of benefit to the bank is not a defense to a misapplication of funds at the time of purchase of the loans. The offense occurred and was complete when the misapplication took place. What might have later happened as to repayment is not material and could not be a defense.

United States v. Acree, 466 F.2d 1114, 1118 (10th Cir. 1972), cert. denied, 410 U.S. 913, 93 S.Ct. 962, 35 L.Ed.2d 278 (1973).

[4, 5] The ultimate ability of the Eglin Bank to foreclose on the Chapman mortgage, while not a defense, had at least colorable relevance to Tidwell's state of mind at the time of the misapplications involved. The issue before the jury was whether Tidwell at the time of misapplying the funds should have known that a natural result of his conduct would be to injure or defraud the bank. To this end, Tidwell was permitted to testify that he was able to secure $700,000 worth of collateral for $128,062.61, that he had "no choice" but to pay the Chapman letter of credit, that the "ultimate result" he intended "was to put the Eglin National Bank . . . in a much better secured position so that

there would be no loss . . . ", and that a first mortgage was in fact secured. T. 486–87. The jury could have interpreted this testimony as negating the requisite intent; it chose not to.[4] Evidence of the later foreclosure on the mortgage might have lent credibility to Tidwell's version of his state of mind at the time of misappropriation by tending to prove that Tidwell could not have known that his acts would have a natural tendency to harm the bank. To this extent the evidence was logically relevant. But it might also have induced the jury to decide the case on whether the bank suffered a pecuniary loss as a result of Tidwell's acts rather than on grounds material to the offense alleged.[5]

4. The judge instructed the jury on this point:

> In determining whether the defendant acted with intent to injure or defraud the bank it is not necessary that the evidence establish he personally profited by his acts or intended to do so. However, if he did not personally profit by his acts, such may be considered by you in determining his intent. T. 542.

5. Such a danger was clearly present in this case. The trial judge instructed the jury that "[i]t is not necessary, however, that actual injury to the bank be shown". T. 541. During its deliberations, the jury passed a note to the judge asking "Did the bank loose [sic] any money"? T. 551. In response to the note, the judge repeated his earlier instruction. T. 557.

Under the Federal Rules of Evidence, the trial judge has broad discretion to exclude evidence where its probative value is substantially outweighed by such dangers as confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Fed.R.Evid. 403. See *United States v. Johnson*, Slip opinion 5617, —— F.2d —— (5th Cir. 1977) [No. 76–2447, decided Sept. 1, 1977]. Because such dangers were present in this case and the evidence offered had no more than attenuated probative value at best, we hold that the trial judge did not abuse his discretion by excluding the foreclosure evidence.

The conviction below as to Counts Nine and Ten was free from harmful error and will be affirmed.

IV. THE UNAUTHORIZED ISSUANCE QUESTION

Counts One, Three, Five, Six and Seven alleged violations of Title 18, U.S.C. § 1005 in that Tidwell, as an officer of the bank, issued letters of credit of the bank without authority of the directors. The indictment did not allege that Tidwell issued these notes "with intent to injure or defraud" the bank, and the trial judge refused to instruct the jury that such intent is an element of the crime. Although the statute on its face does not require proof of intent to complete the offense of unauthorized issuance, Tidwell

argues that Congress intended such a requirement but was careless in revising the statute.

In *Harrison v. United States*, 279 F.2d 19 (5th Cir. 1960), cert. denied, 364 U.S. 864, 81 S.Ct. 105, 5 L.Ed.2d 86, we held that "no specific intent to injure or defraud a bank is an ingredient in the offense charged in the first two paragraphs of Section 1005". *Id.* at 23. We reached this conclusion based on the words of the statute which "itself seems too plain to require judicial construction". Fifteen years later, however, in *United States v. Mann, supra*, 517 F.2d 259, we held that an intent to injure or defraud the bank was an implied element of the offense charged in 18 U.S.C. § 656. Both Sections 656 and 1005 are derived from the same statute, which was broken down and recodified in 1948. (Formerly 12 U.S.C. § 592). In light of this common origin, the Ninth Circuit reasoned that since it had earlier read an intent to injure or defraud into 18 U.S.C. § 656, "we must also read that requirement into the second paragraph of 18 U.S.C. § 1005". *United States v. Pollack*, 503 F.2d 87, 91 (9th Cir. 1974). Although the instant case falls squarely within *Harrison*, Tidwell contends that *Harrison* and *Mann* cannot be reconciled and urges that we adopt the view expressed by the Ninth Circuit in *Pollack*. To do this we would have to overrule *Harrison*.

As we have recently pointed out, "[t]he established policy of this Court is to recognize the binding effect of a prior decision by another panel of the Court subject only to a reversal of the Court sitting en banc". *McDaniel v. Fulton Nat'l Bank of Atlanta,* 543 F.2d 568, 570 (5th Cir. 1976). This policy would require us to affirm Tidwell's conviction on the unauthorized issuance counts if we reached them, leaving him free to petition for a rehearing en banc in order to urge reversal of *Harrison.*

[6] However, as the case stands on appeal, it is unnecessary for us to reach the unauthorized issuance counts. Tidwell was sentenced to three years on each of the seven counts for which he was convicted, the sentences to run concurrently. Since we have affirmed his convictions as to Counts Nine and Ten, we need not decide the issue raised with regard to Counts One, Three, Five, Six and Seven pursuant to the concurrent sentence doctrine. Although we have jurisdiction to decide this issue, see *Benton v. Maryland,* 395 U.S. 784, 791, 89 S.Ct. 2056, 2060–61, 23 L.Ed.2d 707 (1969); *United States v. Stone,* 472 F.2d 909, 916 n. 5 (5th Cir. 1973), we decline to do so as a matter of judicial discretion under the criteria set forth in *United States v. Binetti,* 547 F.2d 265, 269 (5th Cir. 1977).

AFFIRMED.

APPENDIX B

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

November 1, 1977

TO ALL PARTIES LISTED BELOW:

No. 76-4205 - U.S.A. v. LEWIE FRANK TIDWELL

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

**on behalf of appellant, Lewie Frank Tidwell.

cc: Messrs. James G. Etheredge
Richard H. Black
Mr. Emory O. Williams, Jr.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. PCR-76-58

LEWIE FRANK TIDWELL,
Defendant.

ORDER

Before the court is defendant's motion for new trial. Counts 1, 3, 5, 6 and 7 of the indictment, according to a 1960 Fifth Circuit decision, do not require an "intent to injure or defraud" the bank as an element of the offense. *Harrison v. United States*, 279 F.2d 19 (5th Cir. 1960). Each count charges an offense under paragraph 2 of 18 U.S.C. §1005.

Defendant contends that Fifth Circuit, in that opinion, did not review the legislative intent of 18 U.S.C. §1005, as did the Ninth Circuit Court of Appeals in the 1974 opinion, *United States v. Pollack*, 503 F.2d 87 (9th Cir. 1974). In that case, Ninth Circuit reached the conclusion such intent to injure or defraud was an essential element of the crime in view of the legislative history.

Defendant points out that in 1975 a subsequent panel of Fifth Circuit reviewed the same question as it related to 18 U.S.C. §656 and concluded, as did the

Ninth Circuit, that it was an oversight on the reviser's part that these elements were omitted in the new section. *United States v. Mann*, 517 F.2d 959 (5th Cir. 1975).

In *Mann*, the Fifth Circuit reached the conclusion that, notwithstanding the lack of such specific language in the section, 18 U.S.C. §656 did have as an essential element an intent to injure and defraud the bank. In so doing, it reached the conclusion, as have other courts, on consideration of the 1948 revision and the reviser's notes, that the revised sections did not change the meaning or substance of existing law.

In at least one case, the statement has been made: "In applying provisions of 18 U.S.C. §656 . . . courts must be mindful of its history and avoid undue extension as a result of the ill-conceived work of the 1948 reviser." *United States v. Docherty*, 468 F.2d 989 (2d Cir. 1972). Perhaps the most extensive discussion of the legislative history of these revised sections is found in *United States v. Pollack, supra*.

It well may be that Fifth Circuit, inasmuch as it has adopted the position of these other courts reading this language into 18 U.S.C. §656, may also recede from its prior decision and hold such intent also to be an essential element of 18 U.S.C. §1005. As it has not yet done so, however, this court concluded at trial, and now concludes, it should adhere to the ruling of *Harrison* to the effect that such intent to injure or defraud is not an essential element. The rule in *Harrison*, if changed, should be changed by Fifth Circuit and not this court.

In the revision resulting in new sections 656 and 1005, there are some different language changes in

paragraphing of the sections that may at least make some difference in construction of the new statutes.

Beyond that, however, this court is also impressed with the reasoning of *Harrison*:

> It is to be noted that the indictment charged in Court 'that the issuing of the Cashier's check was done' with intent to defraud the bank and the depositors thereof. However, even a casual reading of this section makes plain that no specific intent to injure or defraud a bank is an ingredient in the offense charged in the first two paragraphs of Section 1005. Each of the first three paragraphs states a separate and distinct crime. Neither the first nor the second requires proof of any intent to injure or defraud the bank. The acts described in those two paragraphs are made criminal per se. We find very little case law on this subject. In fact, the only case found is United States v. Johnson, Ohio 1879, 4 Cir., Law Bul. 361 Fed.Cas.No. 15,483. This case cited for the proposition that an intent to injure or defraud was not necessary to complete the crime of drawing bills of exchange or signing notes without authority of bank directors. The statute itself seems too plain to require judicial construction.

(*United States v. Harrison, supra,* at 23.)

To this court, the language in these two sections is too plain to permit or require judicial construction. They are not ambiguous; there is not justification for going into the legislative history to determine the intent of Congress when the plain and unambiguous language of the statute does not justify such inquiry.

It is axiomatic that, in construing a statute, it is improper to resort to extrinsic circumstances, nor may the legislative history compel a construction at variance

with its plain words. Resort to the legislative history is here justified, it appears to this court, only under the cases holding such resort is not forbidden no matter how clear the words may appear on superficial examination. Yet, also, to this court, on either close or superficial examination of the words in 656 and 1005, they appear plain and unambiguous.

[COPY MISSING] and apparently to the courts relying on it, consists only of the reviser's statements. Yet, absent other history, it is also possible it agreed with the reviser's statement that, "It is believed that the revised sections adequately and correctly represent the intent of Congress as the same can be gathered from the overlapping and confusing enactments," and that these sections, expressly making intent to injure or defraud, or to deceive, a part only of the third paragraph of 1005, express the congressional intent.

Nowhere in the reviser's notes, as this court has read them, is there express mention of the omission of language of intent to injure or defraud as it was contained in the prior sections, although the notes do say that certain language was omitted as unnecessary.

It is also noted at least one court was able to reach the conclusion that, with reference to 656, Congress in omitting the words, "intent to injure or defraud," undoubtedly considered these words to be redundant. (See reference in *Pollack,* supra.) Yet, clearly, Congress did not consider them redundant in enacting 1005, for that section expressly included them in its third paragraph.

Other grounds set forth in such motion for new trial have been considered and have been found to be without merit.

By reason of the foregoing, it is,

ORDERED: Defendant's motion for new trial should be and the same is hereby denied.

DONE AND ORDERED this 17th day of November, 1976.

/s/ Winston E. Arnow
WINSTON E. ARNOW
Chief Judge

APPENDIX D

Rev. Stat. 5209:

"Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, *with intent, in either case, to injure or defraud* the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten." (Emphasis added)

12 U.S.C. §592:

"Any officer, director, agent, or employee of . . . a national banking association . . . who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of such . . . national banking association . . . or who, without authority from the directors of such . . . national banking association . . . issues or puts in circulation any of the notes of such . . . national banking association . . . or who, without such authority, issues or puts forth any certificate of deposit, draws any

order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or who makes any false entry in any book, report, or statement of such . . . national banking association . . . *with intent in any case to injure or defraud* such . . . national banking association . . . or any other company, body politic or corporate, or any individual person, or to deceive any officer of such . . . national banking association . . . and every receiver of a national banking association who, *with like intent to defraud or injure,* embezzles, abstracts, purloins, or willfully misapplies any of the moneys, funds, or assets of his trust, and every person who, with like intent, aids or abets any officer, director, agent, employee, or receiver in any violation of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the Court." (Emphasis added.)

Section 656:

Theft, embezzlement, or misapplication by bank officer or employee.– Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or

receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both, but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association", "member bank", means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. (June 25, 1948, c. 645, §1, 62 Stat. 729.

Section 1005:

Bank entries, reports and transactions.– Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificates of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs

of such bank, or the Board of Governors of the Federal Reserve System–

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. (June 25, 1948, c. 645, §1, 62 Stat. 750.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

EGLIN NATIONAL BANK,
Plaintiff,

vs.

THE HOME INDEMNITY COMPANY, NO. PCA [illegible]
Defendant and
Third Party Plaintiff,

vs.

LEWIE TIDWELL,
Third Party Defendant.

JUDGMENT AGAINST THIRD PARTY DEFENDANT, LEWIE TIDWELL

The third party subrogation claim of the Home Indemnity Company against Lewie Tidwell is before the court for entry of judgment, as agreed by the parties, and as set forth in the court's pretrial orders. The judgment entered herein is conditioned upon full payment by the Home Indemnity Company of the judgment entered by the court on September 20, 1976.

It is,

ORDERED AND ADJUDGED that the third party plaintiff, Home Indemnity Company, recover from the third party defendant, Lewie Tidwell, the sum of $105,104.25 with interest at the rate of six percent

(6%) per annum until the judgment is satisfied. This judgement is conditioned upon full payment by the Home Indemnity Company to the Eglin National Bank of the judgment entered on September 20, 1976, with the interest provided herein to commence on the date of such payment.

DONE AND ORDERED this 5 day of October, 1976.

/s/ Winston E. Arnow
WINSTON E. ARNOW
Chief Judge

* * *

[517] (Further off the record conference)

MR. ETHEREDGE: Let me get an objection on the record.

THE COURT: Let the record show that the reference, this objection goes to the charge on proof of intent that comes substantially as the same language as *U.S. versus Wilkinson, 460 Federal Second 725, Fifth Circuit, 1973.* The objection is what?

MR. ETHEREDGE: On this point I'm relying on a case the Court has cited to us, *United States versus Harrison,* which is a 1960 Fifth Circuit case holding to the effect that the Court in a situation where specific intent to defraud is a necessary ingredient of the crime, it would be improper for the Court to charge to such a presumption, that it's presumed –

THE COURT: You misunderstand, sir. That is the very thing they criticized in another one. They draw

the line between presumption and inference. The charge that used to be given talked about presumption and if I recall correctly that's the very thing the Fifth Circuit was critical of and said go to this one.

MR. ETHEREDGE: The objection goes a little further than that. Using the terms "presumption or inference" really is more a term of art, I think, as to carrying any kind of weight.

[518] THE COURT: The cases point out the difference.

LAW CLERK: The other cases were more like the jury should draw the inference.

THE COURT: There's another one on the presumption, but they didn't like the presumption. The change here was from "should" to "may" and I've gone further and said "may, but is not required to." Do you want to object to it?

MR. ETHEREDGE: I think I've got the objection there.

THE COURT: The ground for it is what?

MR. ETHEREDGE: That an inference or presumption I don't think should be drawn under those circumstances because it would allow the jury to reach the result in a specific intent situation that the mere doing of the act with nothing more was sufficient for conviction when there must be proof beyond a reasonable doubt that the specific intent did exist. That's the nature of the objection. And I think it's stated in that Harrison case.

THE COURT: Well, do you want to be heard on it?

MR. WILLIAMS: No, he lost me.

THE COURT: You want the charge given?

MR. WILLIAMS: Yes, sir.

THE COURT: I'm going ahead to give it. When you get through with it, you're almost getting to circumstantial evidence whenever you try to prove intent. There's no way * * *

Supreme Court, U. S.
FILED
MAR 7 1978
MICHAEL RODAK, JR., CLERK

No. 77-787

In the Supreme Court of the United States

OCTOBER TERM, 1977

LEWIE FRANK TIDWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
SIDNEY M. GLAZER,
KATHERINE WINFREE,
Attorneys,
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CITATIONS

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In the Supreme Court of the United States

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LEWIE FRANK TIDWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 559 F. 2d 262.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1977. A petition for rehearing was denied on November 1, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on December 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury shifted the burden of proof to petitioner.

2. Whether the court of appeals properly applied the concurrent sentence doctrine.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on five counts of issuing letters of credit obligating a Federal Reserve System member bank without authority from the directors of that bank, in violation of 18 U.S.C. 1005, and two counts of misapplying bank funds, in violation of 18 U.S.C. 656. He was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed (Pet. App. A).

The relevant facts are undisputed. Petitioner was hired in September 1972 as the president of the Eglin National Bank in Fort Walton Beach, Florida. During his tenure in that capacity, he drew and issued numerous letters of credit without the approval of the bank's board of directors (Pet. App. 2a). The five instruments that formed the basis for petitioner's conviction on the letter of credit counts obligated the Eglin bank in the total amount of \$470,000 (Tr. 461–471). One of these letters, in the amount of \$43,500, was issued to Marvin Chapman (Pet. App. 2a).

Petitioner was also convicted on two counts of misapplication of bank funds. These charges stemmed from a complex transaction in which four banks, in-

cluding Eglin National and Merchants National Bank of Mobile, Alabama, loaned \$600,000 to Chapman and received as collateral two parcels of unimproved property with an appraised value in excess of \$500,000 (Tr. 474–476). In June 1974, Chapman approached petitioner and offered 37 condominium units valued at \$700,000 as additional collateral for his indebtedness if Eglin would cover a check for \$43,000 written by Chapman without sufficient funds, and pay approximately \$40,000 for the first mortgage on the condominiums, held by the Great American Mortgage Company. Petitioner contacted Merchants National Bank and, on July 17, 1974, Merchants credited Eglin's account in the amount of \$85,000, on the understanding that the funds would be used to obtain the first mortgage on the condominium units. Petitioner applied \$43,000 of these funds to cover Chapman's bad check, and attempted to redeem the mortgage with \$38,000 of the remaining funds. Great American, however, refused the offer. In early August 1974, the \$43,500 letter of credit issued to Chapman by petitioner was called and immediate payment was required. Petitioner paid this obligation, using primarily the remaining \$42,000 credited to Eglin's account by Merchants. The payments on Chapman's overdraft and his letter of credit formed the basis for one count charging misapplication of bank funds. Finally, after another unsuccessful attempt, petitioner secured the first mortgage on the condominiums for \$41,562.61. Petitioner paid this sum out of Eglin's funds without

the knowledge or approval of the bank's board of directors. This use of the bank's money formed the basis for the second misapplication count (Pet. App. 3a-4a).

On appeal, petitioner attacked his convictions on the misapplication counts on the ground that the district court had charged the jury improperly with respect to the burden of proof on the intent element of Section 656. Petitioner also challenged an evidentiary ruling of the district court that excluded testimony concerning the Eglin bank's ultimate foreclosure on the mortgage covering the condominium units.[1] The court of appeals rejected petitioner's arguments and affirmed his convictions on the misapplication counts. Relying on the concurrent sentence doctrine, the court found it unnecessary to consider the validity of petitioner's convictions on the counts charging him with unauthorized issuance of letters of credit (Pet. App. 14a).

ARGUMENT

Both statutory provisions under which petitioner was convicted are derived from 12 U.S.C. (1946 ed.) 592, which, in turn, originated in Rev. Stat. 5209 (1878). Apparently, one element of any offense under Section 592 or Section 5209 was an intent to defraud or injure a bank or banking association. In the 1948 federal criminal law codification, 62 Stat. 683, Section 592 was revised and separated into three sections, 18 U.S.C. 334, 656, and 1005. The Reviser's Notes indicated that the revision was intended to clarify and

[1] Petitioner does not now press his evidentiary claim before this Court.

condense "without changing in any way the meaning or substance of existing law." Nevertheless, perhaps by oversight, the explicit requirement of an intent to defraud or injure a bank was included only in the third paragraph of Section 1005 and not at all in Sections 334 or 656.

In *Harrison* v. *United States,* 279 F. 2d 19, 23 (C.A. 5), certiorari denied, 364 U.S. 864, the Fifth Circuit held that "no specific intent to injure or defraud a bank is an ingredient in the offense charged in the first two paragraphs of Section 1005." In *United States* v. *Pollack,* 503 F. 2d 87, 90 (C.A. 9), the Ninth Circuit reached a contrary conclusion. (The five unauthorized issuance counts on which petitioner was convicted charged him with violating the second paragraph of Section 1005.) In *United States* v. *Mann,* 517 F. 2d 259, 267 (C.A. 5), certiorari denied, 423 U.S. 1087, the Fifth Circuit held that an intent to injure or defraud *is* an element of the offenses covered by Section 656, *i.e.,* theft, embezzlement, or misapplication of bank funds by a bank officer or employee. See also *United States* v. *Docherty,* 468 F. 2d 989 (C.A. 2); *Ramirez* v. *United States,* 318 F. 2d 155 (C.A. 9). These developments provide the background for petitioner's current claims.

1. Guided by *United States* v. *Mann, supra,* the district court charged the jury that in order to convict petitioner of misapplying bank funds, in violation of 18 U.S.C. 656, it had to find "that the accused acted with the intent to injure and defraud the bank" (Tr. 540). The court then gave the following instructions

concerning the manner in which such intent might be proved (Tr. 541–543):

> In a case involving willful misapplication of bank funds or credit, the requirement that the defendant intended to injure or defraud the bank may be shown by an unlawful act voluntarily done, the natural tendency of which may have been to injure the bank. It is not necessary, however, that actual injury to the bank be shown.
>
> A reckless disregard of the interest of the bank is, for the purpose of willful misapplication, the equivalent of intent to injure or defraud the bank.
>
> * * * * *
>
> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may but is not required to draw the inference and find that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the Government has proved beyond a reasonable doubt that the defendant possessed the requisite criminal intent.
>
> * * * * *
>
> As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Petitioner contends (Pet. 8–10) that the district court erred in telling the jury that "[i]t is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts." In petitioner's view, this statement shifted the burden of proof on intent from the government to the defendant. Petitioner is incorrect.

No court of appeals has objected to a charge that merely permits the jury to infer from a person's knowing acts that he intended the likely consequences of those acts. The instructions criticized in the cases cited by petitioner and in other court of appeals' decisions fall into two basic categories: either they speak in terms of legal presumptions arising from an individual's acts (*e.g.*, "[t]he law presumes that every man intends the natural and probable consequences of his own knowing acts"),[2] or they allow the jury to infer intent "unless the contrary appears from the evidence."[3] Both of these formulations have been held to impose upon defendants an improper burden of

---

[2] See, *e.g.*, *United States* v. *Netterville*, 553 F. 2d 903, 917–918 (C.A. 5), certiorari denied, No. 77–237, January 9, 1978; *United States* v. *Wilkinson*, 460 F. 2d 725, 729–734 (C.A. 5); *United States* v. *Bertolotti*, 529 F. 2d 149, 159 (C.A. 2).

[3] See, *e.g.*, *United States* v. *Chiantese*, 560 F. 2d 1244 (C.A. 5) (*en banc*); *United States* v. *Robinson*, 545 F. 2d 301, 305–306 (C.A. 2); *United States* v. *Diggs*, 527 F. 2d 509, 513–515 (C.A. 8); *Cohen* v. *United States*, 378 F. 2d 751, 755 (C.A. 9); *United States* v. *Releford*, 352 F. 2d 36, 40 (C.A. 6); *Mann* v. *United States*, 319 F. 2d 404 (C.A. 5), certiorari denied, 375 U.S. 986.

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producing evidence that tends to negate criminal intent.

By contrast, the charge given in this case straightforwardly and accurately informed the jury that it was free either to draw an inference of intent on the basis of petitioner's acts or not to draw such an inference. The instruction now challenged by petitioner is an almost verbatim rendition of the instruction specifically approved by the *en banc* court of appeals after a thorough review of the relevant cases. See *United States* v. *Chiantese*, 560 F. 2d 1244, 1255–1256 (C.A. 5). The only departure from the language endorsed in *Chiantese* was the addition of a phrase designed to emphasize that the jury was not "required to draw the inference" of intent from petitioner's acts. If anything, as the court of appeals observed, this modification benefited petitioner (see Pet. App. 6a–7a). Moreover, the district court's charge taken as a whole left no doubt that the government bore the burden of proving every element of the offenses charged beyond a reasonable doubt. Under these circumstances, the court of appeals properly found that the jury instructions did not shift the burden of proof on the issue of intent.

2. In the court of appeals, petitioner argued that his convictions for unauthorized issuance of letters of credit should be reversed, because the district court failed to instruct the jury that intent to defraud is an element of an offense under the second paragraph of 18 U.S.C. 1005. Petitioner maintained that the court of appeals had reached inconsistent results in deciding

United States v. *Mann*, *supra* (intent to defraud necessary under Section 656), and *Harrison* v. *United States*, *supra* (no intent to defraud necessary under the first two paragraphs of Section 1005). In support of this contention, petitioner cited the legislative history of Sections 656 and 1005 summarized above. Petitioner also stressed that in *United States* v. *Pollack*, *supra*, the Ninth Circuit had concluded that an intent to injure or defraud "was undoubtedly intended as a requirement of all three paragraphs" of Section 1005 (503 F. 2d at 91).[4]

The court of appeals did not formally rule on the validity of petitioner's convictions under Section 1005. Though noting that under established Fifth Circuit policy an individual panel would not be free to depart from the *Harrison* holding, the court pretermitted consideration of the unauthorized issuance counts in reliance on the concurrent sentence doctrine (Pet. App. 14a). Petitioner now repeats his claim that, *Harrison* notwithstanding, an intent to defraud must be proved in order to establish a violation of Section 1005 (Pet. 5–8). Petitioner also asserts (Pet. 10–12)

[4] Petitioner originally advanced this argument in the district court, both during trial (Tr. 173–181) and in a post-conviction motion for a new trial. In its order denying petitioner's motion (Pet. App. C), the district court acknowledged the seeming inconsistency between *Mann* and *Harrison* and also recognized the conflict between *Harrison* and *Pollack*. The court nevertheless determined that it should adhere to the construction of Section 1005 adopted in *Harrison*. If the *Harrison* rule is to be changed, said the court, it "should be changed by [the] Fifth Circuit" (Pet. App. 2c).

that the court of appeals erred in invoking the concurrent sentence doctrine and thereby refusing to resolve the intent issue.

In *Benton* v. *Maryland,* 395 U.S. 784, 787–791, this Court reviewed the historical evolution of the concurrent sentence doctrine and recognized the utility of that doctrine as "a rule of judicial convenience." Finding that the dispute in *Benton* did not present the question, the Court expressly abstained from considering whether constitutional problems might be created by "an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine * * *" (395 U.S. at 791 n. 7). In his concurring opinion, Mr. Justice White agreed that "the concurrent sentence rule * * * should be preserved as a matter of proper judicial administration both on direct appeal and collateral attack, although at least in theory it raises a number of questions concerning the subsequent effects of the unreviewed counts" (395 U.S. at 800). See also *Andersen* v. *Maryland,* 427 U.S. 463, 469 n. 4; *Barnes* v. *United States,* 412 U.S. 837, 848 n. 16.

In the aftermath of *Benton,* the Fifth Circuit has stated that application of the concurrent sentence doctrine is appropriate when "prejudice is not apparent and the possibility of adverse collateral consequences

appears to be remote."[5] *United States* v. *Binetti,* 547 F. 2d 265, 269 (C.A. 5). See also *United States* v. *Smith,* 550 F. 2d 277, 285 (C.A. 5); *Government of Canal Zone* v. *Fears,* 528 F. 2d 641, 644 (C.A. 5). In an effort to show prejudice, petitioner now reiterates the claims first advanced in his brief and petition for rehearing in the court of appeals, namely, that evidence introduced in support of the unauthorized issuance counts may have "spilled over" and influenced the jury's verdict on the misapplication counts, and

[5] Other courts of appeals have followed somewhat different approaches. The Seventh Circuit, for example, has said that it will consider the validity of all challenged convictions unless "there is no possibility of undesirable collateral consequences attendant upon these convictions." *United States* v. *Tanner*, 471 F. 2d 128, 140 (C.A. 7), certiorari denied, 409 U.S. 949. See also *Crovedi* v. *United States*, 517 F. 2d 541, 550 (C.A. 7); *United States* v. *McLeod*, 493 F. 2d 1186, 1189 and n. 1 (C.A. 7). The Sixth Circuit has exercised its discretion to resolve some claims and pretermit others, without stating a general rule. Compare, *e.g.*, *United States* v. *Maze*, 468 F. 2d 529 (C.A. 6), affirmed, 414 U.S. 395, with *Ethridge* v. *United States*, 494 F. 2d 351 (C.A. 6), certiorari denied, 419 U.S. 1025. The District of Columbia Circuit routinely vacates concurrent sentences, subject to reinstatement and full appellate review if the sentence considered and affirmed on appeal should be set aside by this Court or on collateral attack. See, *e.g.*, *United States* v. *Hooper*, 432 F. 2d 604 (C.A. D.C.). Because petitioner was not prejudiced by the court of appeals' treatment of the Section 1005 counts, this case does not present an appropriate occasion for this Court to answer the questions left open in *Benton* or, in an exercise of its supervisory power, to impose on the courts of appeals a particular method of applying the concurrent sentence doctrine.

that the unreviewed convictions under Section 1005 may have affected the sentence imposed on the basis of the convictions under Section 656. Petitioner further alleges that, because of the court of appeals' failure to review the letter of credit convictions, he may be subject to a "substantial money judgment." None of these assertions demonstrates any impropriety in the court of appeals application of the concurrent sentence doctrine.

First, the record contains no indication whatever that the jury, in arriving at its verdict on the Section 656 counts, wrongly considered evidence relevant only to the Section 1005 counts. On the contrary, the record reveals that the evidence on each count was introduced independently and that the court carefully instructed the jury to give separate attention to each count and its supporting evidence (Tr. 533–534, 543). The court explicitly told the jury that a finding of guilt or innocence on any one count should not affect the outcome on other counts (Tr. 543). More important, any evidentiary "spill over" that did occur was the consequence not of the court of appeals' failure to review the unauthorized issuance convictions, but of the decision to conduct a single trial on a multi-count indictment, a procedure about which petitioner does not complain. Even if the court of appeals had reversed the convictions on the letter of credit counts, petitioner would not have been entitled to a new trial on the misapplication counts. See, *e.g., United States* v. *Tanner,* 471 F. 2d 128, 142–143 (C.A. 7), certiorari

denied, 409 U.S. 949; *United States* v. *Maze,* 468 F. 2d 529, 536–538 (C.A. 6), affirmed, 414 U.S. 395.

Similarly an examination of the record does not produce the slightest reason to believe that the sentence imposed on the Section 656 counts was adversely affected by the verdict on the Section 1005 counts. Petitioner was convicted on two counts of misapplying bank funds. The total amount of money involved in these charges was over $125,000. Petitioner faced a sentence of up to five years' imprisonment on each count. The district court's sentence, concurrent terms of three years' imprisonment, was entirely reasonable even in the absence of any additional charges. This case is therefore unlike *United States* v. *Barash,* 365 F. 2d 395 (C.A. 2), and *United States* v. *Jerkins,* 530 F. 2d 1203 (C.A. 5), cited by petitioner.

In *Barash,* appellant was convicted on 26 counts of a 32-count indictment charging him with bribing internal revenue agents. He was sentenced to concurrent terms of one year and one day on each count. Only two of the 26 convictions withstood appellate scrutiny. Each of the two surviving counts charged appellant with aiding and abetting an internal revenue agent in the illegal receipt of a $25 payment. Under these circumstances, the court of appeals refused to apply the concurrent sentence doctrine. The court expressed justifiable concern over the possibility that "the jury might * * * have exercised its prerogative of leniency if these charges alone had been before it; or that the judge [might not] have given the same

sentence for convictions on these two aiding and abetting counts as he did for those on the twenty-six, including convictions of bribery" (365 F. 2d at 403).

Jenkins is also inapposite. There, appellant was convicted on three counts of selling heroin and was sentenced to *consecutive* terms of 15 years' imprisonment on each count. Subsequently, pursuant to Rule 35, Fed. R. Crim. P., the district court decreed that the sentences on two of the counts should run concurrently, but still consecutively to the sentence imposed on the remaining count. The court of appeals then reversed the conviction on this latter count. In view of the fact that the concurrent sentences on the other two counts were to run consecutively to the sentence on the reversed count, the court of appeals remanded the case to the district court either for supplementation of the record to show affirmatively that the sentences had been determined independently or for resentencing without consideration of the invalid count. Here, by contrast, no consecutive sentences were imposed and application of the concurrent sentence doctrine was proper.

Also groundless is petitioner's assertion that a substantial money judgment was entered against him as a result of the court of appeals' failure to review his letter of credit convictions. As a threshold matter, potential civil liability may not be the sort of collateral consequence that should weigh against application of the concurrent sentence rule. But, in any event, the money judgment at issue here could not possibly have been influenced by the court of appeals' decision. The

judgment was entered on October 5, 1976 (Pet. App. E). Petitioner was not convicted until October 29, 1976, and the court of appeals did not affirm until September 14, 1977. At no time has petitioner described how the court of appeals' action might have affected the outcome of the civil suit.

Even though not raised by petitioner in either this Court or the court of appeals, one possible adverse consequence of convictions left unreviewed under the concurrent sentence doctrine merits brief comment. Under guidelines established by the United States Parole Commission, the approximate length of time to be served before release on parole is determined by reference to a matrix involving two variables, the severity of the offense committed and the personal characteristics of the offender. See 42 Fed. Reg. 39813–39815 (to be codified at 28 C.F.R. 2.20). A note to the adult parole eligibility table provides that "[i]f an offense behavior involved multiple separate offenses, the severity level may be increased." 42 Fed. Reg. 39815. Citing this statement, the Eighth Circuit recently refused to apply the concurrent sentence rule, because it feared that an unreviewed conviction might have undesirable parole consequences. See *United States* v. *Holder,* 560 F. 2d 953 (C.A. 8). Whatever the validity of this concern in *Holder,*[6] it is largely irrelevant on the facts of this case. Under the Parole Commission guidelines, the misapplication

[6] Despite its ruling in *Holder*, the Eighth Circuit has by no means abandoned the concurrent sentence doctrine. See, *e.g.*, *United States* v. *Eisler*, C.A. 8, No. 77-1042, decided December 19, 1977.

offenses considered alone would fall in the "very high severity" category, because they are property offenses involving a total amount in excess of $100,000. See 42 Fed. Reg. 39814. Even assuming petitioner's personal rating placed him in the most favorable category, his "parole prognosis" would indicate that he should serve 26 to 36 months before release. Since petitioner has been sentenced to three years' imprisonment, the possibility that his letter of credit convictions will affect his parole eligibility appears remote. Indeed, even if petitioner's sentence were longer, the likelihood that the Parole Commission would increase the severity level of his offenses from "very high" to "greatest" is negligible. The latter category is reserved for a small number of the most heinous offenses, including willful homicide, kidnapping, aircraft hijacking, and narcotics sales in excess of $100,000. Because petitioner has not raised any question regarding his parole opportunities and because those opportunities will not be diminished by the decision below, this Court should not review the court of appeals' sound exercise of its discretion in applying the concurrent sentence rule.[7]

[7] Likewise, where resolution of the issue will have no significant impact upon petitioner, this Court should not address the conflict among the courts of appeals on the question whether intent to defraud is an element of an offense under the first two paragraphs of Section 1005. The decisions of the Fifth Circuit in *Harrison* v. *United States*, *supra*, and the Ninth Circuit in *United States* v. *Pollack*, *supra*, appear irreconcilable, and may eventually necessitate intervention by this Court, but, on the other hand, one or the other of those courts may alter its view of the issue and eliminate the conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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